No. 2460.

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United States
Circuit Court of Appeals
For the Ninth Circuit.

FRANK D. COOPER,

Defendant and Appellant,

vs.

UNITED STATES OF AMERICA,

Complainant and Appellee.

GEORGE HEATON,

Defendant Not Joining in Appeal.

No. 946.

APPELLANT'S BRIEF.

JAMES A. WALSH,
Solicitor for Appellant,
Helena, Montana.

NAEGELE PRINTING CO., HELENA, MONT.

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APPELLANT'S BRIEF.

This suit was prosecuted by the Complainant to cancel a patent for One hundred sixty acres of land, situated in the Helena, Montana, Land District. It is alleged that Jay C. Freeman made a

homestead entry, making the affidavit and paying the fees required by law (Tr. 3-4). That it was incumbent upon said Freeman to make an actual settlement, cultivate and reside upon said lands for a period of five years (Tr. 5). That the said Freeman made final proof on the 18th day of August, 1904, corroborated by two witnesses, William S. Kirkland and Richard T. Loss. That the said Freeman and his witnesses swore that he had resided five years upon the land, and had placed improvements thereon of the value of Four hundred Dollars, (Tr. 6-7). That a final receipt was issued on the 23rd day of August, 1904, and on the tenth day of February, 1905, a patent was issued for said lands (Tr. 9).

That the said affidavits were false and fraudulent. That the said Freeman did not establish his residence upon said land or reside thereon or put the improvements on said land, set forth in his affidavit, and that said affidavits were false and untrue in every particular. (Tr. 9-10-11). That the officers of the land office believed said affidavits, and believed them to be true, and issued to said Freeman a final certificate, and thereafter issued and delivered to him the patent.

That the said Freeman conveyed the lands to the defendant Cooper and that said Cooper occupies said lands and claims ownership thereof. (Tr. 12-13). That said Cooper was not a purchaser in good faith or for a valid consideration, but purchased the same with complete knowledge of the fraud of the said Freeman (Tr. 14-15). And

the Complainant prayed that the patent so issued be declared void and cancelled and the legal and equitable right of possession be restored to the complainant (Tr. 15-16-17).

The defendant Cooper answered denying all knowledge as to the fraud claimed to be perpetrated by Freeman, admitting the conveyance to him and his possession; denied that it was not purchased in good faith, and averred that he purchased the lands in good faith, paid a valuable consideration therefor, and believed and now believes that the said Freeman procured the title to said lands in good faith, and had in all things complied with the law, and without any notice or knowledge that said Freeman had not complied with the law or that it was claimed that he had not so complied (Tr. 20-26).

The defendant further averred that prior to the commencement of the action he entered into a contract with George Heaton and sold the land to him in good faith and for a valuable consideration, and that Heaton purchased it without any notice of the claim of the complainant that said Gilbert had not in all things complied with the law (Tr. 25).

To this the complainant interposed a general replication (Tr. 27). Thereupon testimony was taken, and at the conclusion of the hearing the Court held that Heaton was a necessary party and directed that he be made a party defendant.

United States vs. Cooper, 196 Federal, 584.

Thereupon the Court made an order permitting

the name of Heaton to be added, and to amend the complaint by interlineation (Tr. 28). Thereupon the complainant served notice of amendment of the complaint (Tr. 29-31), and the complaint was thereupon amended by interlineation. Those parts interlined are underscored in the Transcript. Process was served on Heaton September, 1912 (Tr. 32-33). Thereupon the defendant Heaton filed an answer denying generally the allegations contained in the bill of complaint (Tr. 33-39). The defendant Heaton further averred that the matters and things set forth in the bill of complainant did not accrue within six years before the said bill was filed and subpoenas served upon him, Heaton, and thereby pleaded the statute of limitations (Tr. 38-39). To this answer the complainant filed a general replication (Tr. 40-41). Thereupon the case came on for further hearing and on the 15th day of January, 1914, the Court rendered its judgment wherein it was ordered and decreed that the defendant Cooper agreed to sell the said lands to said George Heaton and that more than six years elapsed from the date of the issuance of the patent to the service of the notice upon Heaton, and the concellation of the patent thereby became impracticable.

It was further decreed that the value of the land was Five Dollars and seventy cents per acre, and the complainant was entitled to recover the value thereof, to-wit: Nine hundred Twelve Dollars, with interest at the rate of eight per cent. per annum from the 13th day of December, 1909, amount-

ing in all to $1212.96, and the costs of the action. (Tr. 41-43).

It was further decreed that Cooper pay that amount and that if Cooper did not pay it that the defendant George Heaton pay it out of the purchase price, and such payment would be a discharge of the purchase price to the extent thereof (Tr. 41-43).

The defendant Cooper served notice upon his co-defendant, requesting him to join in an appeal from said judgment (Tr. 87). Heaton refused to join in the appeal (Tr. 87). Thereupon the defendant Cooper served notice of severance and thereafter an order of severance was duly made (Tr. 88-89-90). Thereupon appellant filed a petition for an appeal (Tr. 91) and had issued and served on all the parties a citation (Tr. 101.

ASSIGNMENT OF ERRORS.

The defendant, Frank D. Cooper, in the above entitled action, in conection with his appeal, hereby makes the following assignment of errors, which he avers occurred in this cause, to-wit:

I.

It was error for the court to hold and find that Jay C. Freeman, entryman of the land involved, did not build any house upon said land, and did not reside thereon, and did not fence the same, nor any or either of them prior to his final proof.

II.

It was error for the Court to hold and find that his, Freeman's, improvements did not exceed One Hundred Dollars in value, and that the defendant Cooper knew the said facts, or any of said facts when he purchased the said land from Freeman, or at any other time.

III.

It was error for the Court to hold and find that the defendant Cooper knew of the facts or any of the facts set forth in specific paragraphs Numbered One and Two, when he purchased the said land from Freeman, or at any other time.

IV.

It was error for the Court to hold and find that the defendant, Frank D. Cooper did not pay a valuable consideration for the land embraced in the Freeman entry.

V.

It was error for the court to conclude, hold and find that the final proof of the entryman, Freeman, was false and fraudulent, or that the complainant was induced to issue the patent herein involved by relying on any false or fraudulent statements.

VI.

It was error for the court to conclude, hold and find that the defendant Frank D. Cooper is not or was not a bona fide purchaser of said land.

VII.

It was error for the court to conclude, hold and find that the complainant is entitled to the relief of damages against the defendant Frank D. Cooper in the alleged value of the land, Five and 70/100 ($5.70) Dollars per acre, as stated by the court, with legal interest from December 13th, Nineteen Hundred and Nine, amounting in all to Twelve Hundred and Twelve and 96/100 ($1212.96) Dollars, and all costs.

VIII.

It was error for the court to conclude, hold and find that the value of the land was or is Five and 70/100 ($5.70) Dollars per acre, no evidence having been introduced as to value.

IX.

It was error for the court to conclude, hold and find that unless the said sum of Twelve Hundred and Twelve and 96/100 ($1212.96) Dollars was paid by the defendant Frank D. Cooper, that the defendant George Haeton shall pay the amount thereof to complainant from the unpaid purchase money owing by the defendant Heaton to the defendant Frank D. Cooper upon his contract of purchase of said lands when made a party hereto and appearing herein.

IX.

It was error for the court to conclude, hold and find that such payment, when made by the said Heaton, should be a discharge of said purchase price to the extent thereof.

X.

It was error for the court to conclude, hold and find that the complainant has a lien for the said sum of Twelve Hundred and Twelve and 96/100 ($1212.-96) Dollars upon the land involved, and was entitled to the foreclosure thereof.

XI.

It was error for the court to conclude, hold and find that the complainant was entitled to a decree according to the findings and conclusions of the Court.

XII.

It was error for the court to order, adjudge and decree that the complainant have and recover from the defendant Frank D. Cooper the sum of Nine Hundred and Twelve ($912.00 Dollars, with interest from the 13th day of December, A. D., Nineteen Hundred and Nine, (1909), amounting in all to the sum of Twelve Hundred and Twelve and 96/100 ($1212.96) Dollars, together with the costs and taxes, for that, no issue was raised in the pleadings, and no evidence was introduced concerning the value of the land.

XIII.

It was error for the court to order, adjudge and decree that unless the said amount, Twelve Hundred and Twelve and 96/100 (1212.96) Dollars, and costs, be paid by the defendant, Frank D. Cooper, that the defendant, George Heaton, pay the same to the complainant from the unpaid purchase money

claimed to be owing by the said George Heaton to the defendant Frank D. Cooper upon his contract for the purchase of the lands.

XIV.

It was error for the court to order, adjudge and decree that upon such payment being made by the said defendant George Heaton it shall discharge the purchase price to the extent thereof.

XV.

It was error for the court to order, adjudge and decree that the complainant have a lien upon the lands and premises mentioned in the complaint, for the sum of Twelve Hundred and Twelve and 96/100 ($1212.96) Dollars, and the costs, and that it is entitled to the foreclosure thereof.

THE QUESTIONS PRESENTED UPON THIS APPEAL ARE:

(1.) Is the evidence sufficient to sustain the finding that the entryman Freeman did not comply with the law and was guilty of fraud in making his homestead entry and procuring title thereto?

(2.) Is the evidence sufficient to sustain the finding that the defendant Cooper is not an innocent purchaser without notice and for value?

(3.) Is the decree within the issues and supported by the pleadings and evidence?

ARGUMENT.

The first, second, third and fifths assignments of error relate to alleged fraud of the entryman, Freeman. In actions of this character, it is incumbent upon the plaintiff to produce evidence that is clear and convincing, and a mere preponderance of evidence should not suffice. The burden is upon the Complainant to prove the fraud alleged, and not upon the defendant to disprove it. The witness Foley knew nothing of the conditions of this claim prior to September 1906. The testimony of Mr. Kinsey does not disprove the testimony of Freeman or his witnesses. The witness knew nothing about this claim prior to 1904. The testimony of the witness Frank J. Kinsey is not sufficient to overcome the testimony of the witnesses in final proof. The witness Lavergure knows nothing at all about the claim.

The witness Thomas J. Short did not testify anything about the claim, but only about some alleged conversations with Cooper which were wholly inadmissable. The two witnesses Gardipee, did not show sufficient knowledge to testify as to the conditions of the Freeman claim or whether or not Freeman resided there. The testimony of the witness Belgrade does not prove or disprove any issue in the case, and is wholly inadmissable for any purpose.

The Complainant introduced the evidence of the entryman and his witnesses in making final proof, and having introduced it, it is entitled

to some credence, and it is incumbent upon the plaintiff to overcome that evidence by proof that is clear and convincing. This, I submit, they have failed to do.

The testimony of Short and Belgarde was inadmissable for any purpose. The Complainant sought by this evidence to show that Cooper had induced other people to file on land, but in this they failed.

In the Maxwell Land Grant case, 121 U. S. 325, the Court said:

> "We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument, for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence, which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the Government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles de-

pendent upon these official instruments, demand that the effort to set them aside, to annul them, or to corect mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the Government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect and that amount of it which produces conviction, shall make such an attempt successful."

This language was quoted with approval in the case of United States vs. Budd, 144 U. S. 154.

Applying this test, the complainant's testimony falls far short of making out a clear and convincing case of fraud.

The evidence of the witness Short and Belgarde was not admissable for any purpose. It was introduced for the purpose of showing or attempting to show that other parties filed on lands at the instigation of Cooper. No proof of any contract between them and Cooper was attempted to be proven, and

it was only left to inference that Cooper had a fraudulent intent. This evidence was inadmissable.

In the case of United States vs. Budd, 144 U. S. 154, the Court said:

> "If its title was fairly acquired, it matters not what wrongs have been done by either defendant in acquiring other lands; so the question properly to be considered is, was this land wrongfully and fraudulently obtained from the Government?"

and in that case the Court further said:

> "Because a party has done wrong at one time and in one transaction, it does not necesasrily follow that he has done like wrong at other times and in other transactions."

It is contended that the burden is on the defendant Cooper to prove that he was a bona fide purchaser, without notice and for a valuable consideration.

It is only when the complinant has made out a case supported by strong, clear and convincing testimony that the burden is cast upon the defendant. Complainant has failed to make out such a case.

The complainant, appellee, failed to in any way connect the defendant, appellant, Cooper with the alleged fraud, or to bring home to him notice that the entryman had failed to comply with the law and had practiced a fraud upon the Government and failed

to prove any facts that would lead to such knowledge on the part of the appellant, Cooper.

I respectfully submit that the evidence falls far short of being of that satisfactory and convincing character required in such cases, and further, that the defendant Cooper has established that he was a purchaser in good faith, without notice, and for value.

DEFENDANT COOPER IS AN INNOCENT PURCHASER.

The defendant Cooper pleaded that he was an innocent purchaser for value and without notice. He testified that he purchased the land and paid a valuable consideration for it. He knew nothing of the claim of the complainant that the entryman had not complied with the law. Cooper is a man of large affairs, owned large quantities of land and did not critically examine every tract of land which he purchased, and he did not critically examine the land in question. Final proof had been made to the satisfaction of the Government officials, and he was entitled to rest upon the presumption that the entryman had complied with the law.

He purchased directly from the entryman after the entryman had made proof and his proof was passed upon and accepted by the Government officials.

There is a distinction between purchasing land direct from the entryman and from another. In

case of a purchase from an entryman after the acceptance of his final proof, there is a presumption that he has complied with all the provisions of the law and has a good title.

In United States vs. Stinson, 197 U. S. 200, the Court said:

> "While the government, like an individual, may maintain any appropriate action to set aside its grants and recover property of which it has been defrauded, and while laches or limitation do not of themselves constitute a distinct defense as against it, yet certain propositions in respect to such an action have been fully established. First, the respect due to a patent,—the presumption that all the preceding steps required by law have been observed before its issue. The immense importance and necessity of the stability of titles depending upon these official instruments demand that suits to set aside and annul them should be sustained only when the allegations on which this is attempted are clearly stated and fully sustained by proof."
>
> "Second. The government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual. 'It should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction,

shall make such an attempt successful.' ''

* * *

Further:

> "But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that, to a bill in equity to cancel the patents upon these grounds alone, the defense of a bona fide purchaser for value, without notice, is perfect."

These quotations are supported by numerous decisions of United States Supreme Court cited in the original opinion, which we think unnecessary to cite here.

In the Maxwell Land Grant case, 121 U. S. 325, the Court said:

> "The deliberate action of the tribunals to which the law commits the determination of all preliminary questions, and the control of the processes by which this evidence of title is issued to the grantee, demands that, to annul such an instrument, and destroy the title claimed under it, the facts on which this action is asked for must be clearly established by evidence entirely satisfactory to the court, and that the case itself must be entirely within the class of causes for which such an instrument may be avoided."

See also Colorado Coal & Iron Company vs. United States, 123 U. S. 307.

The complainant, appellee, failed to in any way

connect the defendant, appellant, Cooper with the alleged fraud, or to bring home to him notice that the entryman had failed to comply with the law and had practised a fraud upon the Government and failed to prove any facts that would lead to such knowledge on the part of the appellant, Cooper.

I respectfully submit that the evidence falls far short of being of that satisfactory and convincing character required in such cases, and further, that the defendant Cooper has established that he was an innocent purchaser in good faith and without notice.

THE DECREE IS NOT WITHIN THE ISSUES AND IS NOT SUPPORTED BY PLEADINGS OR EVIDENCE.

The character of the decree entered renders it unnecessary to discuss at length the question of the alleged fraud of the entryman or Cooper's alleged knowledge of the fraud or the consideration paid by him for the land. The decree is outside of any issue raised by the pleadings and outside of any evidence introduced at the trial.

The suit was brought for the express purpose of cancelling the patent. The bill of Complaint was framed for that and no other purpose. If the pleadings and evidence do not entitle complainant to a decree cancelling patent, complainant is not entitled to any other relief.

The defendant Cooper alleged in his answer that he had sold the land to George Heaton. The

complainant took issue on that subject and filed a general replication.

After the testimony was taken the Court held that Heaton was a necessary party.

United States vs. Cooper, 196 Fed. 584.

The Court permitted the Complainant to amend its bill of complaint by interlineation, and an order was made to that effect (Tr. 28). The bill was amended accordingly (Tr. 29-30-31). The parts interlined are underscored in the bill of Complaint so that they may be identified by the Court.

More than six years elapsed from the date patent was issued and the order making Heaton a party and the service of process upon him. He pleaded the statute of limitations (Tr. 38-39).

The Court by its decree, adjudged and decreed that on account of the expiration of six years from the date of the issuance of the patent it could not be cancelled, and decreed that the value of the land was $5.70 per acre or $912., and decreed that the defendant Cooper pay that amount with interest, amounting in all to $1212.96. And unless that amount was paid by Cooper that the defendant Heaton pay it out of the money due Cooper, and such payment would discharge Heaton to the extent of such payment from the money due Cooper under the Contract.

I respectfully submit that this decree is wholly outside of the issues raised by the pleadings and

wholly outside of the evidence. There is not a single allegation in any of the pleadings or any allegation that in any way affects the value of this land, and no evidence of value was offered or admitted.

Heaton avers that he purchased this land and other lands from Cooper at $5.70 per acre, but there is no allegation that that is the value of the land.

The contract between Cooper and Heaton shows that he purchased 21,840 acres at the rate of $5.70 per acre. But the Court cannot presume that all that land was of equal value. Indeed, the Court should take judicial notice of the fact that in such a large tract of land in this mountainous country with its mountains and valleys there is a great diversity in the character and value of the land. One tract may be smooth tillable land and the adjoining tract rough and stony. One tract may be valuable for agricultural purposes and the adjoining tract worthless for any purpose other than pasture, and of little value for that. But the subject was not an issue in the case. It was not raised by the pleadings. Under the pleadings no evidence could have been introduced as to value. None was introduced. If it was an issue in the pleadings, and evidence had been admissable to prove value, the value of this particular tract would have to be established, not the price at which over 21,000 acres was sold. The question of value not being an issue, the Court could not, under a prayer for general relief determine the value of the land and declare that Cooper shall pay the

amount, and that if he does not pay that Heaton shall pay it and he shall thereupon be discharged for that amount due Cooper under the contract.

Heaton has sold the land. Can an execution issue against Heaton? Can an execution issue against Cooper? Can the government order a sale of the land and compel Cooper to pay any deficiency? To support a judgment of that kind there must be proper allegations. It is elementary that a decree must be supported by the pleadings and the evidence. The decree in this case is not supported by the pleadings and the evidence is wholly outside of both.

In Windsor vs. McVeigh, 93 U. S. 274, the Court said:

> "Though the Court may possess jurisdiction of a cause, of the subject matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and canont then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is

powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases."

In Washington, Alexandria & Georgetown Railroad Company vs. Mayor and Board of Aldermen of Washington, 77 U. S. 299, 19 Lawyer's Edition, 894, the Court said:

"It is hardly necessary to repeat the axioms in the equity law of procedure, that the allegations and proofs must agree, that the court can consider only which is put in issue by the pleadings, that averments without proofs and proofs without averments are alike unavailing, and that the decree must conform to the scope and object of the prayer, and cannot go beyond them. Certainly without the aid of a cross-bill the court was not authorized to decree against the complainants the opposite of the relief which they sought by their bills. That is what was done by the decree under consideration."

In Crocket vs. Lee, 7 Wheaton 523, Chief Justice Marshall said:

"The rule that the decree must conform to

the allegations as well as to the proofs of the parties, is not only one which justice requires, but one which necessity imposes on courts. We cannot dispense with it in this case."

In English vs. Foxall, 2 Peters 595, the Court said:

"There is no doubt but that, under the general prayer, other relief may be granted than that which is particularly prayed for. But such relief must be agreeable to the case made by the bill; and there is nothing in the first bill to sustain the particular relief granted as to the deficiency."

In Hayward vs. Bank, 96 U. S. 611, the Court said:

"But such liability is not charged, nor is such relief asked in the bill. The specific relief sought is a decree requiring the Bank to transfer the stock to him—a thing now beyond its power to do. It is true that the bill contains a general prayer for such relief as may be consistent with equity and good conscience; but we incline to the opinion that its whole frame and structure are inconsistent with a right in this action to a decree for the value of the stock, even if the facts justified any such relief."

And so in the case at bar. The Court acknowl-

edged and decreed that it was beyond its power to do that which the Complainant demanded in its prayer for relief and as set forth in its pleadings, and such relief being beyond the power of the Court, it gave a judgment and decree and relief to the Complainant wholly outside of the issues and wholly unsupported by evidence.

In the case of New Orleans vs. Citizens Bank, 167 U. S. 371, the Court said:

> "We are at a loss to understand by what process of reasoning the decree was made to cover the question of the nonliability of the bank for license. It was not presented by the pleadings, and was entirely dehors the issues in the case."

The same rule prevails in all courts.

In Alywin vs. Morley, 41 Mont. 191, 108 Pac. 778, the Supreme Court said:

> "It will, however, be conceded that the judgment in her favor must rest upon some proper pleading, either her own or that of the plaintiff. A judgment without a pleading to support it cannot stand; and this is the reason why the question whether a complaint states facts sufficient to constitute a cause of action is never waived and can be raised in this court for the first time."

The judgment entered in this case, being outside of and not supported by the pleadings or evi-

dence must be reversed. The court, having adjudged and decreed that the patent cannot be cancelled, thereby affirmed the patent and the complainant not having appealed from that judgment, it became final. The complainant is not entitled to any relief whatever under the issues raised in the pleadings and the judgment should be reversed and the action dismissed.

Respectfully submitted,

JAMES A. WALSH,
Solicitor for Appellant.